No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF U.S. COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 5

I. The Proclamation Harms American Innovation And Economic Growth. 5

A. Immigration provides significant benefits to the U.S. economy. 5

B. The Proclamation harms the U.S. economy. 8

1. The Proclamation creates widespread uncertainty. 9

2. The Proclamation's ban on travel significantly impairs day-to-day business. 11

3. The Proclamation incentivizes immigration to and investment in foreign countries rather than the United States. 12

II. The Proclamation Is Unlawful. 14

A. The INA does not authorize the executive branch to implement unilateral, permanent revisions of the Nation's immigration laws. 14

B. The Proclamation exceeds the authority conferred by Section 1182. 17

1. The Proclamation does not contain a finding sufficient to justify exercise of the authority conferred by Section 1182(f). 17

TABLE OF CONTENTS—continued

Page

2. The Proclamation conflicts with other provisions of the INA.....21
3. The Proclamation is procedurally unreasonable. 23
C. The Proclamation violates Section 1152's non-discrimination requirement.....25
D. This Court can, and must, adjudicate the scope of the President's authority.....28
Conclusion 30
Appendix A – List of *Amici Curiae*..... 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abourezk v. *Reagan*,
785 F.2d 1043 (D.C. Cir. 1986) 15, 23, 30

Amoco Oil Co. v. *Envtl. Prot. Agency*,
501 F.2d 722 (D.C. Cir. 1974) 18

Arizona v. *United States*,
567 U.S. 387 (2012) 16

Bowen v. *Mich. Acad. of Family Physicians*,
476 U.S. 667 (1986) 28

Carlson v. *Landon*,
342 U.S. 524 (1952) 17

Crawford Fitting Co. v. *J. T. Gibbons, Inc.*,
482 U.S. 437 (1987) 27

Dalton v. *Specter*,
511 U.S. 462 (1994) 24, 29

Dames & Moore v. *Regan*,
453 U.S. 654 (1981) 28

Foley v. *Connelie*,
435 U.S. 291 (1978) 2

Franklin v. *Massachusetts*,
505 U.S. 788 (1992) 28

Hawaii v. *Trump*,
859 F.3d 741 (9th Cir.) 3, 21

Heckler v. *Chaney*,
470 U.S. 821 (1985) 29

Indus. Union Dep't, AFL-CIO v.
Am. Petroleum Inst.,
448 U.S. 607 (1980) 18

TABLE OF AUTHORITIES—continued

Page(s)

Int'l Refugee Assistance Project v. *Trump*,
857 F.3d 554 (4th Cir. 2017) 3

Int'l Refugee Assistance Project v. *Trump*,
883 F.3d 233 (4th Cir. 2018) ..... *passim*

Kent v. *Dulles*,
357 U.S. 116 (1958) 17, 19

Kerry v. *Din*,
135 S. Ct. 2128 (2015) 21

United States ex rel. Knauff v. *Shaughnessy*,
338 U.S. 537 (1950) 28

Legal Assistance for Vietnamese Asylum Seekers v. *Dep't of State*,
45 F.3d 469 (D.C. Cir. 1995) 25, 26

Mobil Oil Expl. & Producing Se. Inc. v. *United Distribution Cos.*,
498 U.S. 211 (1991) 18

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 24

Olsen v. *Albright*,
990 F. Supp. 31 (D.D.C. 1997) 27, 28

Patel v. *Reno*,
134 F.3d 929 (9th Cir. 1997) 29

Saavedra Bruno v. *Albright*,
197 F.3d 1153 (D.C. Cir. 1999) 29

Sale v. *Haitian Ctrs. Council, Inc.*,
509 U.S. 155 (1993) 29

TABLE OF AUTHORITIES—continued

Page(s)

United Distribution Cos. v. *F.E.R.C.*,
88 F.3d 1105 (D.C. Cir. 1996) 18

United States v. *Mead Corp.*,
533 U.S. 218 (2001) 24

United States v. *Witkovich*,
353 U.S. 194 (1957) 17, 18

Whitman v. *Am. Trucking Ass'ns*,
531 U.S. 457 (2001) 17

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 28

Zemel v. *Rusk*,
381 U.S. 1 (1965) 17, 19

Statutes and Regulations

82 Fed. Reg.
8,977 (Jan. 29, 2017) 3
13,209 (Mar. 6, 2017) 3, 4
45,161 (Sept. 24, 2017) ..... *passim*

5 U.S.C. § 553(c) 24

8 U.S.C.
§ 1152(a) 25, 26
§ 1182(a) 15, 21, 22, 23
§ 1182(f) ..... *passim*
§ 1185(a) 14, 16, 24, 27
§ 1187(a)(12) 22

Other Authorities

Americas Soc'y & Council of the Americas,
Bringing Vitality to Main Street (2015) 6

TABLE OF AUTHORITIES—continued

Page(s)

Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016) 7

Stuart Anderson, Nat'l Found. for Am. Pol'y, *The Contributions of the Children of Immigrants to Science in America* (Mar. 2017) 8

Stuart Anderson, Nat'l Found. for Am. Pol'y, *Immigrants and Billion Dollar Startups* (Mar. 2016) 6

John Austin et al., Mich. Econ. Ctr., *Michigan: We Are All Migrants Here* (2017) 13

Maksim Belenkiy & David Riker, *Face-to-Face Exports: The Role of Business Travel in Trade Promotion*, 51 J. Travel Res. 632 (2012) 11

BGRS, *Breakthrough to the Future of Global Talent Mobility* (2016) 11

Muzaffar Chishti & Claire Bergeron, Migration Pol'y Inst., *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape* (Sept. 8, 2011) 2

Economic Effects of Immigration Policies, Bus. Roundtable (Sept. 2017) 7

Robert W. Fairlie et al., Ewing Marion Kauffman Found., *The 2016 Kauffman Index: Startup Activity* (Aug. 2016) 6

TABLE OF AUTHORITIES—continued

Page(s)

Seth Fiegerman, *Former Google Exec Calls Trump Travel Ban an 'Enormous Problem,'* CNN Tech (Jan. 30, 2017) 10

David Steele-Figueredo, *Trump's Anti-Immigrant Rhetoric Is Already Hurting US Higher Education*, Times Higher Educ. (Jan. 30, 2018) 10

Michael Greenstone & Adam Looney, The Hamilton Project, *Ten Economic Facts About Immigration* (Sept. 2010) 7

H.R. Rep. No. 89-745 (1965) 26

Harv. Bus. Rev., *Strategic Global Mobility* (2014) 11

Nune Hovhannisyan & Wolfgang Keller, *International Business Travel: An Engine of Innovation?*, 20 J. Econ. Growth 75 (2015) 11

Immigration Laws and Iranian Students, 4A Op. O.L.C. 133 (1979) 18

Elizabeth MacBride, CNBC, *Silicon Valley Reeling as Trump Chokes Off a Critical Source of Tech Talent* (Mar. 15, 2018) 12

Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* (Jan. 23, 2017) 15

Mass. Tech. Leadership Council, *The Economic Impact of Immigration on the United States* (June 2017) 13

TABLE OF AUTHORITIES—continued

Page(s)

New Am. Econ., *Reason for Reform: Entrepreneurship* (Oct. 2016) 7

Alex Nowrasteh, Cato Inst., *New Trump Executive Order Fails Cost-Benefit Test*, (Sept. 25, 2017) 13

Org. Econ. Co-operation & Dev., *International Migration Outlook 2017* (41st ed. 2017) 12

Pia Orrenius, George W. Bush Inst., *Benefits of Immigration Outweigh the Costs*, The Catalyst (2016), https://goo.gl/qC9uOc 7

Tara Palmeri & Bryan Bender, *U.S. Diplomats Warning GE's Major Deals in Iraq at Risk over Travel Ban*, Politico (Feb. 1, 2017) 12

P'ship for a New Am. Econ., *Open For Business: How Immigrants Are Driving Small Business Creation in the United States* (Aug. 2012) 6

P'ship for a New Am. Econ., *The "New American" Fortune 500* (2011) 5, 6

Remarks at the Opening Ceremonies of the Statute of Liberty Centennial Celebration (July 3, 1986) 2

S. Rep. No. 89-748 (1965) 26

Dionne Searcey & Jaime Yaya Barry, *Chad, an Ally Against Militants, Asks, "Why Us?"*, N.Y. Times (Sept. 25, 2017) 12

TABLE OF AUTHORITIES—continued

Page(s)

U.S. Chamber of Commerce, *Immigration: Myths and Facts* (2016) 7

Vivek Wadhwa et al., *America's New Immigrant Entrepreneurs*, Duke Univ. & Univ. Cal. Berkeley (Jan. 4, 2007) 7

INTEREST OF THE *AMICI CURIAE*

Amici curiae are 115 of the Nation's leading companies. *Amici* produce iconic goods and services that touch nearly every aspect of our lives—from business and finance to recreation and communication. Together, *amici* employ millions of Americans and contribute significantly to our country's economy. A complete list of *amici* is set forth in Appendix A.[1]

Amici are gravely concerned about the adverse effects of the Presidential Proclamation challenged in this case. As *amici* explain below, the Proclamation makes it more difficult for them to hire the very best talent, to send their employees abroad, to grow their operations, and, fundamentally, to compete in the global economy. *Amici* believe that the Proclamation will therefore stifle the Nation's economic growth and global competitiveness. *Amici* previously raised these concerns before this Court and before the court below. See Pet. App. 60a.

Amici's own stories reflect the benefits that immigrants bring to the Nation. Many *amici* were founded by immigrants, virtually all employ immigrants, and every *amicus* recognizes that the American economy, and the Nation as a whole, thrives when it welcomes immigrants with properly calibrated policies.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of *amicus curiae* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, stable U.S. immigration policy has embodied the principles that we are a people descended from immigrants, that we welcome new immigrants, and that we provide a home for refugees seeking protection. As President Reagan noted when rededicating the Statue of Liberty in 1986, "which of us does not think of * * * grandfathers and grandmothers, from so many places around the globe, for whom this statue was the first glimpse of America?" Remarks at the Opening Ceremonies of the Statute of Liberty Centennial Celebration (July 3, 1986), https://goo.gl/1qwq5N. See also *Foley* v. *Connelie*, 435 U.S. 291, 294 (1978) (describing America as "a nation of immigrants").

At the same time, America has long recognized the importance of protecting ourselves against those who would do us harm. But we have done so while maintaining our fundamental commitment to welcoming immigrants—through increased background checks and other controls on people seeking to enter our country.[2]

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[2] "In the decade since 9/11," immigration policy has incorporated, among other things, "major new border security and law enforcement initiatives, heightened visa controls and screening of international travelers and would-be immigrants, the collection and storage of information in vast new interoperable databases used by law enforcement and intelligence agencies, and the use of state and local law enforcement as force multipliers in immigration enforcement." Muzaffar Chishti & Claire Bergeron, Migration Pol'y Inst., *Post-9/11 Policies Dramatically Alter the U.S. Immigration Landscape* (Sept. 8, 2011), https://goo.gl/6rdagt.

For more than fifty years, moreover, immigration rules have been based on input from, and consideration of views advanced by, all relevant stakeholders—through congressional legislation and agency notice-and-comment rulemaking—with exceptions limited to temporary measures addressing emergency situations.

On January 27, 2017, "[o]ne week after inauguration and without interagency review," Executive Order 13,769, 82 Fed. Reg. 8,977 (Jan. 29, 2017) ("First Executive Order"), was issued. *Hawaii* v. *Trump*, 859 F.3d 741, 756 (9th Cir.), *vacated*, 138 S. Ct. 377 (2017). That Order altered immigration policy in significant respects: it barred nationals of seven countries—Syria, Libya, Iran, Iraq, Somalia, Yemen, and Sudan—from entering the United States for at least 90 days (First Executive Order § 3(c)), with the possibility of expansion to additional countries (*id.* § 3(e)-(f)), and it gave the Secretaries of State and Homeland Security discretion to issue visas to affected nationals "on a case-by-case basis" (*id.* § 3(g)).

On March 6, 2017, the First Executive Order was rescinded, and Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("Second Executive Order"), was issued. That Order banned nationals from six countries for 90 days beginning on March 16—the same countries as the first order, omitting Iraq, but subjecting nationals from Iraq to intensive scrutiny—and otherwise contained many of the characteristics of the First Executive Order. Second Executive Order §§ 2(c), 4. That Order, like the First Executive Order, was enjoined by multiple courts. See, *e.g.*, *Hawaii*, 859 F.3d 741; *Int'l Refugee Assistance Project* v. *Trump*, 857 F.3d 554 (4th Cir.), *vacated*, 138 S. Ct. 353 (2017).

On September 24, 2017, the Second Executive Order was supplanted by Presidential Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (the "Proclamation"). The Proclamation bans nationals, in whole or in part, from *eight* countries—Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen—without *any* expiration date. Proclamation § 2. The Proclamation again confers discretion on consular officers to "grant waivers on a case-by-case basis" to nationals from the designated countries. *Id.* § 3(c). And the Proclamation creates a procedure by which the Secretaries of Homeland Security and State can identify new countries to subject to the ban. *Id.* § 4(a)(ii). "As with EO-1 and EO-2, the Proclamation faced swift legal challenge." *Int'l Refugee Assistance Project* v. *Trump*, 883 F.3d 233, 253 (4th Cir. 2018). See also Pet. App. 4a.

Like its prior iterations, the Proclamation effects a significant shift in the rules governing entry into the United States; injects substantial uncertainty and instability into the Nation's immigration system; and inflicts harm on American companies, their employees, and the entire economy. It hinders the ability of American companies to attract talented employees; increases costs imposed on business; makes it more difficult for American firms to compete in the international marketplace; and gives global enterprises a new, significant incentive to build operations—and hire new employees—outside the United States.

The Proclamation is unlawful because it exceeds the executive branch's authority under the Nation's immigration laws. Narrow statutory provisions that authorize the executive branch to address emergency circumstances on a temporary basis do not license

significant, permanent alterations to standards set forth in immigration laws.

Moreover, to bar a class of aliens from the United States, the executive branch must reasonably determine that their entry would be detrimental to the Nation, and then craft an order that reasonably addresses any threat that those individuals might pose. But the Proclamation neither explains why the targeted individuals' entry would be detrimental to the United States nor imposes reasonable restrictions.

Finally, Congress in 1965 prohibited discrimination in immigration decisions on the basis of national origin precisely so that the Nation would not shut its doors to immigrants based on where they come from—but the Proclamation does just that. It would turn the clock back and restore the national-origins system that Congress expressly abolished.

The Court accordingly should affirm the decision below barring enforcement of the Proclamation.

ARGUMENT

I. The Proclamation Harms American Innovation And Economic Growth.

Immigration is a key driver of the U.S. economy. The Proclamation, both by its direct effects and by the signal it sends, hamstrings American innovation and economic growth.

A. Immigration provides significant benefits to the U.S. economy.

To begin with, immigrants are leading entrepreneurs. "The American economy stands apart because, more than any other place on earth, talented people from around the globe want to come here to start their businesses." P'ship for a New Am. Econ., *The*

"New American" Fortune 500, at 5 (2011), http://goo.gl/yc0h7u. Indeed, "[i]mmigrants continue to be a lot more likely than the native-born to become entrepreneurs." Robert W. Fairlie et al., Ewing Marion Kauffman Found., *The 2016 Kauffman Index: Startup Activity* 7 (Aug. 2016), https://goo.gl/6Wr5Mc.

Some of these businesses are large. "Immigrants have started more than half (44 of 87) of America's startup companies valued at $1 billion dollars"—so-called "unicorns"—"and are key members of management and product development teams in over 70 percent (62 of 87) of these companies." Stuart Anderson, Nat'l Found. for Am. Pol'y, *Immigrants and Billion Dollar Startups* 1, 4 (Mar. 2016), https://goo.gl/Mk7iJM. Immigrants or their children founded more than 200 of the companies on the Fortune 500 list, including Apple, Kraft, Ford, General Electric, AT&T, Google, McDonald's, Boeing, and Disney. P'ship for a New Am. Econ., *supra*, at 1-2. Collectively, these companies generate annual revenue of $4.2 trillion and employ millions of Americans. *Id.* at 2.

Many of these businesses are small. "While accounting for 16 percent of the labor force nationally and 18 percent of business owners, immigrants make up 28 percent of Main Street business owners." Americas Soc'y & Council of the Americas, *Bringing Vitality to Main Street* 2 (2015), https://goo.gl/i9NWc9. These are "the shops and services that are the backbone of neighborhoods around the country." *Id.* In 2011, immigrants opened 28% of all new businesses in the United States. See P'ship for a New Am. Econ., *Open For Business: How Immigrants Are Driving Small Business Creation in the United States* 3 (Aug. 2012), https://goo.gl/zqwpVQ.

Immigrant entrepreneurs come from all parts of the world. In 2014, "19.1 percent of immigrants from the Middle East and North Africa were entrepreneurs." New Am. Econ., *Reason for Reform: Entrepreneurship* 2 (Oct. 2016), https://goo.gl/QRd8Vb.

Immigrants also fuel the growth of the economy as a whole. "When immigrants enter the labor force, they increase the productive capacity of the economy and raise GDP. Their incomes rise, but so do those of natives." Pia Orrenius, George W. Bush Inst., *Benefits of Immigration Outweigh the Costs*, The Catalyst (2016), https://goo.gl/qC9uOc. Immigrants thus create new jobs for U.S. citizens "through the businesses they establish ... [and] play an important role in job creation in both small and large businesses." U.S. Chamber of Commerce, *Immigration: Myths and Facts* 3 (2016), https://goo.gl/NizPEQ. Studies "overwhelmingly conclude that immigrants have a net positive effect on wages, especially in the long run." *Economic Effects of Immigration Policies*, Bus. Roundtable 3 (Sept. 2017), https://goo.gl/PnG3pB.

Immigrants are also innovators. Since 2000, more than one-third of all American Nobel Prize winners in Chemistry, Medicine, and Physics have been immigrants. See Stuart Anderson, *Immigrants Flooding America with Nobel Prizes*, Forbes (Oct. 16, 2016), http://goo.gl/RILwXU. Among individuals with advanced educational degrees, immigrants are nearly three times more likely to file patents than U.S.-born citizens. Michael Greenstone & Adam Looney, The Hamilton Project, *Ten Economic Facts About Immigration* 11 (Sept. 2010), https://goo.gl/3zpdpn. By one estimate, noncitizen immigrants were named on almost a quarter of all U.S.-based international patent applications filed in 2006. Vivek Wadhwa et

al., *America's New Immigrant Entrepreneurs*, Duke Univ. & Univ. Cal. Berkeley 4 (Jan. 4, 2007), https://goo.gl/wCIySz. And children of immigrants made up 83% of the top-performing students in the well-known Intel high school science competition. Stuart Anderson, Nat'l Found. for Am. Pol'y, *The Contributions of the Children of Immigrants to Science in America* 1-3, 5, 12 (Mar. 2017), https://goo.gl/7noMyC.

In sum, immigrants provide incalculable benefits to the U.S. economy and the Nation as a whole.

B. The Proclamation harms the U.S. economy.

"[B]ecause the proclamation bans the entry of potential entrepreneurs, inventers, and innovators, the public's interest in innovation is thwarted at both the state and corporate levels." Pet. App. 60a.

But that is not all. The Proclamation abandons the principles that have undergirded U.S. immigration policy for more than half a century—clear, settled standards and constrained discretion. It introduces sudden changes without an opportunity for affected parties to inform decisionmakers of the consequences of those changes before their adoption, provides unclear standards for implementation, and leaves entirely to individual officers' discretion the exercise of case-specific waiver authority.

Moreover, nothing prevents future executive branch changes in the immigration system unrelated to the matters addressed in this Proclamation. Businesses need a predictable, stable system so they can make long-term personnel and investment decisions and be certain that they will be able to interact with their global customers. The continuing risk of addi-

tional, unanticipated changes in immigration rules creates significant uncertainty that imposes a substantial burden on managing global businesses and planning for the future.

The Proclamation will therefore make it more difficult and expensive for U.S. companies to recruit, hire, and retain some of the world's best employees. It will disrupt ongoing business operations—making it harder for U.S. companies to compete in today's global markets. And it will inhibit investment in the United States. That will inflict significant harm on American business, innovation, and economic growth.

1. The Proclamation creates widespread uncertainty.

Confusion and uncertainty are the hallmarks of the Proclamation and its predecessors. The Proclamation again establishes a system of "case-by-case" exceptions from its ban on nationals from eight countries, but leaves the application of those exceptions to the discretion of Customs and Border Protection officers—setting forth a non-exhaustive list of circumstances in which such exceptions "*may be* appropriate." Proclamation § 3(c) (emphasis added). Because individual immigration officers retain broad discretion in issuing these individual-by-individual exceptions, it is unclear what exemptions will actually be given, or why—and whether that authority is being exercised fairly and without discrimination or favoritism.

Even more important, the Proclamation provides that the ban, and its accompanying standardless exception process, may be expanded to include an unspecified number of additional countries if those na-

tions do not provide information the Secretaries of Homeland Security and State deem necessary to approve visas. See Proclamation § 4(a). Individuals and businesses thus face the significant risk that new, as-yet-unidentified countries will be added to the ban—all without any governing standard.

The Proclamation will have the immediate, adverse consequence of making it far more difficult and expensive for U.S. companies to hire the world's best talent and compete effectively in the global marketplace. Businesses and employees have little incentive to go through the laborious process of sponsoring or obtaining a visa and relocating to the United States if an employee may be unexpectedly stopped at the border.

The Proclamation and its prior iterations have also significantly reduced the talent pipeline: enrollment data from the last year shows that they have discouraged international students from enrolling in U.S. colleges. David Steele-Figueredo, *Trump's Anti-Immigrant Rhetoric Is Already Hurting US Higher Education*, Times Higher Educ. (Jan. 30, 2018), https://goo.gl/VEaVp5.

At the end of the day, skilled individuals will not wish to immigrate to this country if they may be cut off without warning from their spouses, grandparents, relatives, and friends. They will not pull up roots, incur significant economic risk, and subject their family to considerable uncertainty to immigrate to the United States in the face of this instability. Seth Fiegerman, *Former Google Exec Calls Trump Travel Ban an 'Enormous Problem,'* CNN Tech (Jan. 30, 2017), https://goo.gl/vNVgLt. The Proclamation therefore significantly disadvantages U.S. companies in the global competition for talent.

2. The Proclamation's ban on travel significantly impairs day-to-day business.

The marketplace for today's businesses is global. Companies routinely send employees across borders for conferences, meetings, or job rotations; and they invite customers, clients, and users from abroad to attend meetings in the U.S. Global mobility is therefore critical to businesses whose customers, suppliers, users, and workforces are spread all around the world. See, *e.g.*, BGRS, *Breakthrough to the Future of Global Talent Mobility* (2016), http://goo.gl/ZhIxSr; Harv. Bus. Rev., *Strategic Global Mobility* (2014), http://goo.gl/AV3nhJ.

Global business travel enables employees to develop new skills, take on expanded roles, and stay abreast of new technological or business developments. It also facilitates development of new markets and business partnerships. Indeed, one study has shown that each additional international business trip increases exports from the United States to the visited country by, on average, over $36,000 per year. Maksim Belenkiy & David Riker, *Face-to-Face Exports: The Role of Business Travel in Trade Promotion*, 51 J. Travel Res. 632, 637 (2012). See also Nune Hovhannisyan & Wolfgang Keller, *International Business Travel: An Engine of Innovation?*, 20 J. Econ. Growth 75 (2015).

But the Proclamation will mean that many companies and employees (both inside and outside the United States) would be unable to take advantage of these opportunities. The Proclamation will prevent companies from inviting customers to the United States and prevent employees from outside the United States from traveling here. That is true even for persons or countries not currently covered by the

Proclamation because there is no way to know whether or when a country may be added to the no-entry list.

The Proclamation also could lead to retaliatory actions by other countries, which would seriously hinder U.S. companies' ability to do business or negotiate business deals abroad. U.S. companies' deals have already been threatened. See, *e.g.*, Dionne Searcey & Jaime Yaya Barry, *Chad, an Ally Against Militants, Asks, "Why Us?"*, N.Y. Times (Sept. 25, 2017), https://goo.gl/xSPDSo; Tara Palmeri & Bryan Bender, *U.S. Diplomats Warning GE's Major Deals in Iraq at Risk over Travel Ban*, Politico (Feb. 1, 2017), http://goo.gl/nhj9CZ.

3. The Proclamation incentivizes immigration to and investment in foreign countries rather than the United States.

Because of the Proclamation, highly skilled individuals will be more interested in working elsewhere, in places where they and their colleagues can travel freely and with assurance that their immigration status will not suddenly be revoked. Other countries have already begun "actively pursuing foreign investors and entrepreneurs, with the aim of increasing investment and creating jobs for the benefit of the national economy." Org. Econ. Co-operation & Dev., *International Migration Outlook 2017* 46 (41st ed. 2017). See also Elizabeth MacBride, CNBC, *Silicon Valley Reeling as Trump Chokes Off a Critical Source of Tech Talent* (Mar. 15, 2018), https://goo.gl/BJscj3 (giving examples).

Non-U.S. companies have taken note, as well. Multinational companies will have strong incentives, including pressure from their own employees, to base

operations outside the United States or to move or hire employees and make investments abroad. Foreign companies will have significantly less incentive to establish operations in the United States and to hire American citizens, because the Proclamation will preclude the ability of those companies to employ their world-class talent within their U.S. subsidiaries. Ultimately, American workers and the economy will suffer as a result.

These impacts are concrete and quantifiable: one study found that the Proclamation would reduce wages for U.S. citizens and residents by roughly *$1.4 billion* over the next ten years. See Alex Nowrasteh, Cato Inst., *New Trump Executive Order Fails Cost-Benefit Test*, (Sept. 25, 2017), https://goo.gl/N5Cgoj. And these adverse effects have been felt nationwide, from Michigan (see John Austin et al., Mich. Econ. Ctr., *Michigan: We Are All Migrants Here* 10-12 (2017), https://goo.gl/D3bz99) to Massachusetts (see Mass. Tech. Leadership Council, *The Economic Impact of Immigration on the United States* 3-4 (June 2017), https://goo.gl/Cvt3uC) and beyond.

* * * *

Of course, the federal government can and should implement targeted, appropriate adjustments to our country's immigration system to enhance the Nation's security. But a broad, open-ended ban—together with the indication that the ban could be expanded to other countries, or that additional, different restrictions could be adopted, without notice—will undermine rather than protect American interests, producing serious, widespread adverse consequences without any reasonable relationship to the goal of making the country more secure.

II. The Proclamation Is Unlawful.

The Proclamation is unlawful for several reasons. We focus on three. *First*, the Immigration and Nationality Act ("INA") does not authorize the use of unilateral executive action to fundamentally and permanently change the character of the Nation's immigration laws. *Second*, the Proclamation is not authorized by Section 1182 or the Immigration and Nationality Act as a whole; the Proclamation lacks an adequate finding of detriment; it conflicts with other relevant statutory provisions; and it fails to comply with necessary procedural requirements. And *third*, the Proclamation violates the nondiscrimination requirement of Section 1152.

A. The INA does not authorize the executive branch to implement unilateral, permanent revisions of the Nation's immigration laws.

The government relies primarily on the President's power under the INA to "suspend the entry of * * * any class of aliens" whose entry he finds "would be detrimental to the interests of the United States * * * for such period as he shall deem necessary." 8 U.S.C. § 1182(f). It also points to Section 1185(a), which permits the President to issue "reasonable rules, regulations, and orders" and "limitations and exceptions" for the entry of immigrants and nonimmigrants. Those grants of authority, the government claims, "authorize the President to halt any and all foreign travel into the country at any time, from any and all countries, for any reason he decrees, for however long he wishes, notwithstanding any other provision of law." *IRAP*, 883 F.3d at 291 (Gregory, C.J., concurring).

But these statutory provisions do not confer such unlimited authority. No other administration has used these statutes to presumptively prohibit the entry of millions of foreign nationals solely on the basis of their nationality—and in perpetuity. The text and context of Sections 1182(f) and 1185(a) make clear that an exercise of authority must be limited to a specific, emergency situation. The Proclamation here exceeds those limitations.

By its terms, Section 1182(f) allows the executive branch to "suspend" the entry of certain aliens for a designated "period"—not to prohibit entry by those aliens in perpetuity. Pet. App. 26a. In other words, Section 1182(f) is "a gap-filling provision," authorizing targeted, temporary action to respond to an emergency situation. *IRAP*, 883 F.3d at 296 (Gregory, C.J., concurring). See *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (explaining that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the [inadmissibility] categories in [S]ection 1182(a)").

That was the context in which the language contained in Section 1182(f) was enacted. See page 18, *infra*. And it is how past administrations have employed this authority since 1952, each time issuing a targeted restriction, usually limited to dozens or hundreds of people on the grounds that each affected person had engaged in culpable conduct, such as human trafficking, illegal entry, or corruption. See Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 (Jan. 23, 2017), https://goo.gl/D0bRkS; Pet. App. 35a-38a. This consistent executive branch practice is powerful evidence of the limited reach of the provision, and it is

consistent with the context of Section 1182(f)—as one provision in an extraordinarily detailed set of statutory rules, elaborated in administrative regulations, that govern the issuance of visas and entry of aliens.

Similarly, Section 1185(a) permits the President to issue "*reasonable* rules, regulations, and orders" regarding the entry of aliens into the United States. 8 U.S.C. § 1185(a)(1) (emphasis added). Like Section 1182(f), it does not purport to give the executive branch authority to engage in wholesale, permanent revision of the Nation's immigration laws.

These statutes cannot be read to confer absolute authority over the Nation's immigration system to the executive branch. Without the important limitations imposed by the statutes' text and structure, the executive could usurp Congress's power under Article I, Section 8 to "establish a uniform rule of naturalization." See also *Arizona* v. *United States*, 567 U.S. 387, 409 (2012) ("Policies pertaining to the entry of aliens and their right to remain here are * * * entrusted exclusively to Congress.") (quotation omitted). Congress did not intend, and the Constitution does not permit, that result.

The Proclamation here exceeds the powers granted under these two statutes. It applies to millions of people, sweeping them in because of their nationality, rather than on the basis of culpable conduct. And unlike the first two executive actions, the Proclamation does not expire—meaning that it is the polar opposite of a time-limited, gap-filling measure. It is, instead, the replacement of the system established by Congress with a new scheme crafted by the executive branch. The INA does not authorize permanent unilateral revision of the immigration laws.

B. The Proclamation exceeds the authority conferred by Section 1182.

Even assuming that Section 1182 confers authority to permanently revise the Nation's immigration laws, the Proclamation fails to do so in a manner that comports with the statute.

1. The Proclamation does not contain a finding sufficient to justify exercise of the authority conferred by Section 1182(f).

The text of Section 1182(f) is clear: the President may only suspend the entry of aliens if he "finds" that their entry "would be detrimental to the interests of the United States." Congress could not have made it more plain that it did not intend to confer upon the executive branch unbounded power to bar aliens, and instead conditioned authority under Section 1182(f) upon an adequate finding of detriment.

That Congress required such a finding is unsurprising, for Congress may delegate power only if "the executive judgment is limited by adequate standards." *Carlson* v. *Landon*, 342 U.S. 524, 544 (1952). An "intelligible principle" must guide the exercise of delegated power. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

For that reason, the Court has consistently identified limits on discretionary authority delegated by Congress, even when confronted with a clause that seems "limitless" when read "in isolation and literally." *United States* v. *Witkovich*, 353 U.S. 194, 198-202 (1957). See, *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) (rejecting the view that "simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice"); *Kent* v. *Dulles*, 357 U.S. 116, 127, 128 (1958) (considering the

power to issue passports, the Court observed that the executive's authority was "expressed in broad terms," but refused to "impute to Congress * * * a purpose to give [the executive] unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose"). See also Pet. App. 39a-42a.

Section 1182 also contains a clear limitation on presidential action: the President must "find" that the specified aliens' entry would be "detrimental to the interests of the United States." A reasonable finding of the requisite "detriment[]" thus "constitute[s] a condition precedent to embarking upon the exercise of regulatory power"—and such action is invalid in the absence of such a reasonable determination. *Amoco Oil Co.* v. *Envtl. Prot. Agency*, 501 F.2d 722, 736 (D.C. Cir. 1974). Indeed, courts in a variety of contexts analyze whether the executive branch has reasonably made the findings specified by Congress as prerequisites for executive action. See, *e.g.*, *Mobil Oil Expl. & Producing Se. Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 227 (1991); *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 642 (1980); *United Distribution Cos.* v. *F.E.R.C.*, 88 F.3d 1105, 1139 (D.C. Cir. 1996).

The executive branch must therefore meet a standard of reasonableness in exercising Section 1182(f) authority. *Witkovich*, 353 U.S. at 198-202 (holding that authority to request information that the Attorney General "may deem fit and proper" had an implicit limit of reasonableness). That conclusion accords with the longstanding interpretation of the statute by the Executive Branch. See *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140

(1979) (recognizing that any suspension under Section 1182(f) "must meet the test of 'reasonableness'").

In addition, the permissible justifications for the exercise of this authority are limited by the context in which Congress acted when it adopted the language codified in Section 1182(f). Congress drew that text from a series of narrowly drawn wartime statutes, proclamations, and regulations permitting the executive branch to exclude only limited classes of aliens, for limited periods of time, to address emergency situations. See Hawaii Br. 38-41. That context restricts the use of the authority conferred by Section 1182. *Zemel*, 381 U.S. at 17-18 (statute "must take its content from history"); *Kent*, 357 U.S. at 128 (grounds for refusing passport limited to those that "it could fairly be argued were adopted by Congress in light of prior administrative practice").

The Proclamation transgresses this limitation on executive authority. It provides barely any justification for why the admission of aliens it bans from the United States—based on nothing more than their national origin—would be detrimental to the Nation. Its express aim is to protect U.S. "citizens from terrorist attacks and other public-safety threats," by preventing "foreign nationals who may * * * pose a safety threat * * * from entering the United States." Proclamation, pmbl. But it "makes no finding whatsoever that foreign nationals' nationality alone renders entry of this broad class of individuals a heightened security risk to the United States." Pet. App. 45a. See also *IRAP*, 883 F.3d at 317 (Keenan, J., concurring).

Certainly there is no reasonable basis to conclude that nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen, simply by

virtue of their national origin, will commit terrorist activities upon entry to the United States.[3] Indeed, the ban applies to hundreds of thousands of students, employees, and family members of citizens who have been previously admitted to the United States—and thus who the United States, after careful, individualized review, concluded that their admission to the United States posed no security risk to the Nation.

The past history of admitting these individuals is especially important because "there is no finding that the present vetting procedures are inadequate." Pet. App. 44a. The Proclamation simply recites well-known facts regarding these countries *as a whole*, ignoring that no alien from these countries admitted to the United States has engaged in terroristic activity.

It is no surprise that the Proclamation falls back on a different rationale: that the designated countries, with the exception of Somalia, "continue to have 'inadequate' identity-management protocols, information-sharing practices, and risk factors." Proclamation § 1(g). But "[n]owhere in the Proclamation does the President claim that these *individuals* pose a detriment to the United States' interests because they are nationals of these particular countries." *IRAP*, 883 F.3d at 317 (Keenan, J., concurring). Nor does the purported need to encourage these countries to improve their practices amount to the statutorily required finding that the entry of nationals from the-

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[3] Indeed, the administration itself did not think so until it found itself embroiled in litigation. As a study from the Department of Homeland Security noted, "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity." Pet. App. 45a n.20.

se countries "would be detrimental" to the United States. Claimed "inadequacy" cannot constitute a reason for banning 140 million people from the United States based on nothing more than their nationality.

The Proclamation's purported rationale falls short for other reasons. The Proclamation does not include *thirty-nine* other countries with borderline performance; "the explanation for how the administration settled on the list of eight countries is obscured." Pet. App. 10a n.3 (quotation omitted). The list remains both overinclusive and underinclusive: its focus on nationality "could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war." *Hawaii*, 859 F.3d at 773 (quotation omitted). And its reliance on the exclusion of several listed countries from the Visa Waiver Program is unconvincing: rather than "restricting travel from countries with inadequate risk factors," Congress "enacted provisions *facilitating* travel from low-risk countries." Pet. App. 31a (emphasis added).

In sum, the Proclamation lacks the reasonable finding of detriment required by Section 1182(f).

2. The Proclamation conflicts with other provisions of the INA.

The Proclamation also displaces the INA's specific requirements for excluding aliens on the basis that they might commit acts of terrorism. See 8 U.S.C. § 1182(a)(3)(B). That statute—"a complex provision with 10 different subsections" that "cover[s] a vast waterfront of human activity" (*Kerry* v. *Din*, 135 S. Ct. 2128, 2145, 2146 (2015) (Breyer, J., dissent-

ing))—provides detailed standards for determining when an alien may be excluded based on a potential to commit terrorist acts. Specifically, an alien who has never before engaged in terrorist activities or joined a terrorist organization may be excluded only if the government has a "reasonable ground to believe" that the alien "is likely to engage after entry in any terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(II).

The Proclamation's system of ad hoc waivers turns that provision on its head. Instead of creating a presumption of *admittance* absent any "reasonable ground" to think an alien will commit terrorist activities—as Section 1182(a)(3)(B) requires—the Proclamation creates a presumption of *exclusion* and leaves it to Customs and Border Protection to decide whether an alien has demonstrated, "to the consular officer's * * * satisfaction," that he or she would not threaten national security. Proclamation § 3(c)(i).

The Proclamation thus eliminates Congress's substantive requirement that there be reasonable grounds to exclude an alien on the basis of the threat of future acts of terrorism. And it does so without even attempting to explain why changed circumstances or other facts make Congress's determinations inadequate to protect the Nation.[4]

As construed by the government, therefore, Section 1182(f) would allow the executive branch to re-

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[4] In addition, Congress in 2015 specifically considered the risk that travelers from these countries might engage in terrorism, and addressed it by exempting them from the visa waiver program. See Pub. L. 114-113, div. O, tit. II, § 203, 129 Stat. 2242 (codified at 8 U.S.C. § 1187(a)(12)). That congressional determination, too, is overridden by the Proclamation without any justification or explanation.

write *all* of Congress's detailed rules for when aliens may be excluded, which are set forth in detail in Section 1182(a). "[T]he statute lists thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power." *Abourezk*, 785 F.2d at 1051. By banning groups of aliens at will, and for reasons that contradict the standards specified by Congress, the executive has "nullif[ied] numerous specific provisions of the INA indefinitely * * * and has overridden Congress's legislative responses to the same concerns the Proclamation aims to address." Pet. App. 32a.

Indeed, were the Court to uphold the Proclamation here, an administration could use Section 1182(f) to rewrite the immigration laws in their entirety, prescribing via executive order an entire new regime—with standards for issuing visas and excluding aliens wholly different from those prescribed by Congress. Section 1182(f) does not, as the government would have it, empower the executive to nullify duly enacted immigration laws at will. If it did, such a delegation of authority would pose grave constitutional concerns.

3. The Proclamation is procedurally unreasonable.

The comprehensive revision of the immigration system effected by the Proclamation—and the executive orders that apparently will follow—improperly circumvents Congress's directive that significant changes in immigration rules be implemented through notice and comment rulemaking.

Sections 2(a) to 2(f) of the Proclamation effectively create a new immigration system pursuant to which the Secretary of Homeland Security, the Sec-

retary of State, and the Director of National Intelligence determine what unspecified "information" countries must share with the United States in order to allow their nationals to enter this country. Then, these officials may recommend to the President an expansion or extension of the ban on entry to the United States.

In addition, the Proclamation confers effectively unconstrained discretion on consular officers and customs officials to "grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited." Proclamation § 3(c). Other than listing a series of nonexclusive considerations, the Proclamation neither proscribes a procedural mechanism for this exercise of discretion, nor establishes substantive guideposts to govern the exercise of this broad discretion.

Congress expressly identified the need for rulemaking in the INA, authorizing the President to impose "reasonable rules, regulations, and orders." 8 U.S.C. § 1185(a). But no such rulemaking occurred here, notwithstanding the Proclamation's broad applicability. Moreover, while the Administrative Procedure Act does not generally apply to the President's actions (see *Dalton* v. *Specter*, 511 U.S. 462, 469 (1994)), it *does* apply to the subsequent conduct of the Departments of State and Homeland Security, which must ultimately implement the Proclamation.

Rulemaking "foster[s] * * * fairness and deliberation" (*United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001)), and gives "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). See also *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

(rulemaking process ensures that an agency has not "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Here, the notice-and-comment process is particularly important given the huge range of individuals and entities affected by these rules, such as families seeking to reunite, or even just to have the opportunity to visit one another; businesses wishing to interact with customers, to enable employees to obtain experience at their home offices in the United States, or to hire individuals with expertise not otherwise available; and cultural institutions planning performances by artists from outside the United States. For these reasons, Section 1182(f) does not provide a means of circumventing the ordinary rulemaking process for promulgating legal principles of general applicability.

C. The Proclamation violates Section 1152's non-discrimination requirement.

The Proclamation separately contravenes 8 U.S.C. § 1152(a)(1)(A), which provides that "no person shall * * * be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." "Congress could hardly have chosen more explicit language" to "unambiguously direct[] that no nationality-based discrimination" shall occur with respect to immigration. *Legal Assistance for Vietnamese Asylum Seekers* v. *Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996).

Congress enacted Section 1152 to "'eliminate the national origins system as the basis for the selection of immigrants to the United States.'" Pet. App. 49a (quoting H.R. Rep. No. 89-745, at 8 (1965) (alterations omitted)). That system, as President Johnson explained, was "incompatible with our basic American tradition" that we "ask not where a person comes from but what are his personal qualities." H.R. Rep. No. 89-745, at 11. Congress replaced the national origins system with "a new system of selection designed to be fair, rational, humane, and in the national interest" (S. Rep. No. 89-748, at 13 (1965)), based largely on "the advantage to the United States of the special talents and skills of the immigrant." H.R. Rep. No. 89-745, at 18.

On its face, the Proclamation discriminates on the basis of nationality and therefore violates Section 1152. Although the Proclamation purports to bar only the entry of designated foreign nationals, it does so "*by precluding consular officers from issuing visas* to nationals from the designated countries." Pet. App. 50a. "This directly contravenes Congress's 'unambiguous directions that no nationality-based discrimination occur.'" *Id.* (quoting *Legal Assistance for Vietnamese Asylum Seekers*, 45 F.3d at 473) (alterations adopted).[5]

Section 1152 must be understood to constrain the powers granted by Section 1182(f). Section 1152, as the "later-enacted, more specific provision," "provides

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[5] The Proclamation also cannot be defended as creating "procedures for the processing of immigrant visa applications" (8 U.S.C. § 1152(a)(1)(B)). That statute—at most—permits the executive to regulate the manner in which foreign nationals can receive visas or enter the United States, but does not authorize a sweeping ban on nationals from eight countries.

a specific anti-discrimination bar to the President's general § 1182(f) powers." Pet. App. 52a. See, *e.g.*, *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.") (quotation omitted). Section 1152 also "clearly provides for exceptions in a number of circumstances," and "[t]he conspicuous absence" of Sections 1182(f) and 1185(a) from that list strongly indicates that Congress did not intend to include them. Pet. App. 52a-53a.

The government asserts that there is no conflict between the Proclamation and Section 1152 because, "if an alien abroad is subject to the Proclamation and does not qualify for a waiver, he is denied an immigrant visa because he is ineligible to enter under Section 1182." Pet'r Br. 51 (quotation and alteration omitted). But it makes no difference that the aliens who are banned by the Proclamation cannot receive visas because they are barred from entering the United States when the *reason* for that bar is their national origin.

Congress did not allow for Section 1152 "to be so easily circumvented." Pet. App. 51a. Put differently, Congress could not have intended to prohibit discrimination at the embassy but permit it at the airport gate. Congress instead commanded "that government must not discriminate against particular individuals because of the color of their skin or the place of their birth," because such discrimination "is unfair and unjustified" wherever it occurs. *Olsen* v. *Albright*, 990 F. Supp. 31, 39 (D.D.C. 1997).

In sum, the Proclamation exceeds the authority conferred by Section 1182—but even if it does not, it

nonetheless violates the ban on nationality-based discrimination codified in Section 1152.[6]

D. This Court can, and must, adjudicate the scope of the President's authority.

"Congress intends the executive to obey its statutory commands and, accordingly, * * * it expects the courts to grant relief when an executive agency violates such a command." *Bowen* v. *Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). For this reason, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)).

It is fundamental that the President's exercise of his statutory powers is not above review by this Court. In *Dames & Moore* v. *Regan*, for instance, the Court addressed claims that President Reagan's executive order suspending certain claims against Iran exceeded the President's statutory powers, holding that the order fell within that authority. 453 U.S. 654, 666-667 (1981). See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544-547 (1950) (reviewing on the merits claims that a presidential proclamation violated two statutes). Respondents here raise a similar claim, arguing that the Order

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[6] To be sure, the text of Section 1152 only prohibits discrimination with respect to immigrant visas. But the basic nondiscrimination principle that it embodies is reflected throughout U.S. law. *Olsen*, 990 F. Supp. at 33 (addressing nonimmigrant visas). Section 1182(f) therefore does not confer authority to discriminate on this basis with respect to nonimmigrant visas in the absence of a reasonable justification for displacing this fundamental principle. Such a justification is lacking here.

exceeds the President's limited authority under Section 1182(f).

To be sure, there is a narrow exception to judicial review where a statute gives the President unlimited discretion to make a discrete and specific decision. See *Dalton*, 511 U.S. at 477. This rule reflects the general principle that review is unavailable when a statute is "drawn in such broad terms that in a given case there is no law to apply." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985).

The President's discretion under Section 1182(f) is not unlimited, as it was in *Dalton*. Instead, the President's authority is constrained by the requirement that he make an adequate finding of detriment, and that he exercise his power under Section 1182 reasonably. Accord *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-188 (1993) (assessing legality of President's exercise of Section 1182(f) authority). The Proclamation is unlawful—and the Court should say so.

Petitioners' invocation of the so-called "consular nonreviewability" doctrine is similarly misplaced. Pet'r Br. 19. The question here does not involve an individualized, discretionary "decision" by a "consular official" to "issue or withhold a visa." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Rather than any discretionary determination, it is the scope of the President's authority to establish broad standards banning wholesale immigration from certain specified nationalities. Such determinations are reviewable. Cf. *Patel* v. *Reno*, 134 F.3d 929, 932 (9th Cir. 1997) ("The Patels are challenging the consul's authority to suspend their visa applications, not challenging a decision within the discretion of the consul. Therefore, jurisdiction exists to consider

whether the consulate has the authority to suspend the visa applications."). And, given that many respondents are not themselves foreign nationals, the harms addressed in this case span far beyond individualized entry or admissions decisions.

Petitioners assert that this "distinction is fundamentally flawed" because the doctrine of consular nonreviewability bars any "review of the President's national-security and foreign-relations judgments." Pet'r Br. 21-22. But that argument proves too much. "The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless." *Abourezk*, 784 F.2d at 1061. To the extent that courts ever hesitate to review statutory claims about individualized consular officer determinations, that has no bearing on the sort of claims raised here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A

LIST OF *AMICI CURIAE*

1. A Medium Corporation
2. Adobe Systems Incorporated
3. AdRoll, Inc.
4. Affirm, Inc.
5. Airbnb, Inc.
6. AltSchool, PBC
7. Amazon.com, Inc.
8. Ampush LLC
9. Asana, Inc.
10. Atlassian Corp. Plc
11. Automattic/WordPress.com
12. Azavea Inc.
13. Bigtooth Ventures
14. Bitly, Inc.

15. Box, Inc.

16. Braze, Inc. (formerly Appboy, Inc.)

17. Brightcove Inc.

18. Bungie, Inc.

19. CareZone Inc.

20. Casper Sleep Inc.

21. Castlight Health

22. Checkr Inc.

23. Chegg, Inc.

24. Chobani, LLC

25. Civis Analytics, Inc.

26. ClassPass Inc.

27. Cloudera, Inc.

28. Cloudflare, Inc.

29. Codecademy

30. Color Genomics, Inc.
31. Copia Institute
32. DocuSign, Inc.
33. Dropbox, Inc.
34. eBay Inc.
35. Edmodo, Inc.
36. Electronic Arts Inc.
37. Eventbrite Inc.
38. Expa, LLC
39. Facebook, Inc.
40. Fastly, Inc.
41. Flipboard, Inc.
42. Foursquare Labs, Inc.
43. General Assembly Space, Inc.
44. GitHub, Inc.

45. Glassdoor
46. Google LLC
47. Greenough Consulting Group
48. Gusto
49. Hewlett Packard Enterprise
50. HP Inc.
51. IDEO LLP
52. Justworks
53. Kickstarter, PBC
54. Knotel
55. Lam Research Corporation
56. Levi Strauss & Co.
57. Light Labs Inc.
58. Linden Research, Inc. d/b/a Linden Lab
59. Lyft, Inc.

60. Mapbox, Inc.

61. Marin Software Incorporated

62. Medallia, Inc.

63. Medidata Solutions, Inc.

64. Microsoft Corporation

65. Minted, LLC

66. Molecule Software, Inc.

67. MongoDB, Inc.

68. Mozilla Corporation

69. MPOWERD Inc.

70. Netflix, Inc.

71. NETGEAR, Inc.

72. NewsCred, Inc.

73. NIO U.S.

74. Oath, Inc.

75. Pandora Media, Inc.

76. Patreon, Inc.

77. PayPal Holdings, Inc.

78. Pixability, Inc.

79. Plaid Inc.

80. Postmates Inc.

81. Pure Storage, Inc.

82. Quantcast Corp.

83. Quora, Inc.

84. RealNetworks, Inc.

85. Reddit, Inc.

86. Redfin Corporation

87. Salesforce.com, Inc.

88. Shutterstock, Inc.

89. Singularity University

90. Snap Inc.

91. Space Exploration Technologies Corp.

92. Spokeo, Inc.

93. SpotHero, Inc.

94. Spotify USA Inc.

95. Square, Inc.

96. Squarespace, Inc.

97. Strava, Inc.

98. SugarCRM

99. Sunrun, Inc.

100. SurveyMonkey Inc.

101. TaskRabbit, Inc.

102. Tesla, Inc.

103. Thumbtack, Inc.

104. TripAdvisor, Inc.

105. Turo Inc.

106. Twilio Inc.

107. Uber Technologies, Inc.

108. Upwork Inc.

109. Verizon Communications Inc.

110. Via Transportation, Inc.

111. Warby Parker

112. Wikimedia Foundation, Inc.

113. Work & Co.

114. Workday, Inc.

115. Y Combinator Management, LLC